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## HONG LEONG BANK BHD

**v.**

## CHEE KOK WENG;
## NEXT CAR SDN BHD (THIRD PARTY)

B

HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUIT NO: D-22-1728-2009]
4 APRIL 2012

C

***HIRE PURCHASE:*** *Hire purchase agreement - Purchase of vehicle - Purchase of vehicle with liability for custom duties and taxes - Financing of balance purchase price - Seizure of vehicle by customs - Whether there was breach of hire purchase agreement - Whether there was breach of*

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*s. 7(a) and (b) Hire Purchase Act 1967 - Whether there was breach of s. 14 Sales of Goods Act 1956 by third party*

The defendant had entered into an agreement to purchase a Ferrari 430-F1 ('the vehicle') at the price of USD225,013 (not more than RM830,000) from a third party, on the basis that the former would be liable to settle the custom duties and taxes for the vehicle. A pro forma invoice was issued, showing that the vehicle was worth RM1.8million and a deposit RM1 million had allegedly been paid by the defendant. The balance sum due and owing to the third party was RM800,000 and subsequently, the defendant applied for financing for the said amount from the plaintiff. The plaintiff granted a hire purchase facility to the defendant to finance the purchase of the vehicle. However, the car was seized by the customs and the defendant, through his solicitors, issued a notice to the plaintiff, claiming a breach of the hire purchase agreement. The defendant then stopped paying the instalments due under the hire purchase facility. In turn, the plaintiff applied for the release of the vehicle from the customs, not knowing that the defendant had already done the same. Despite having the vehicle in its possession and repeated demands by the plaintiff, the defendant did not make any repayment under the hire purchase facility. The plaintiff then brought the present action against the defendant for alleged breach of the hire purchase agreement and initiated a third party proceedings against the third party as the seller of the vehicle. The defendant went on to file his defence and brought a counter claim against the plaintiff. In

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the present action before the court, the issues that arose for determination were (i) whether the plaintiff had breached s. 7(a) and (b) of the Hire Purchase Act 1967 ('the Act'); and (ii) whether there was a breach of s. 14 of the Sales of Goods Act 1956 ('SOGA') by the third party.

**Held (for the plaintiff):**

**(1)** The defendant's case was totally inconsistent with his letter of indemnity in which he acknowledged to be solely responsible for the duties. There was no sum of RM1 million paid by the defendant to the third party as per the pro forma invoice. Despite notice to produce served by the plaintiff, the defendant was not able to produce evidence of payment for the shortfall of about RM173,277.83. The amount of RM800,000 received from the plaintiff was refunded to the defendant and there was no other transaction of car between the defendant and the third party. (paras 14-16)

**(2)** The car had not been forfeited and the vehicle, upon release by the customs, was in the defendant's possession. It was evidently clear that the defendant was responsible to pay the duty and the car would not be forfeited had he kept to his bargain. Since there was no forfeiture resulting from the breach of the plaintiff or the third party, the defendant's reliance on s. 7 of the Act would be abhorrent to notions of justice and fair play. (para 17)

**(3)** The Act is not cultured to give credence to wrongful acts or conduct of hirer but to protect innocent hirers and the court had wide powers under s. 33(1) and (2) of the Act to re-open the transaction to ensure that there was no injustice. In the circumstances, the court would allow the plaintiff's prayers (i) and (ii) and dismissed the defendant's counter claim. (para 17)

*[Order accordingly]*

**Case(s) referred to:**

*Affin-ACF Finance Berhad v. Phang Ngan Heong [2010] 7 CLJ 592 HC* ***(refd)***

*AmBank (M) Bhd v. Pang Tee Chiang & Anor Appeal [2012] 1 CLJ 206 CA* ***(refd)***

*Autokita Sdn Bhd v. Public Finance Bhd [2006] 1 CLJ 653 HC* ***(refd)***

*BBMB Kewangan Bhd v. Tan Swee Heng & Anor [2002] 7 CLJ 377 HC* ***(dist)***

*Jaafar Shaari & Anor v. Tan Lip Eng & Anor [1992] 3 CLJ 1600; [1992] 2 CLJ (Rep) 597 HC* ***(refd)***
*Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC* ***(refd)***
*Lian Lee Motor Sdn Bhd v. Azizuddin Khairuddin [2001] 1 CLJ 768 HC* ***(refd)***
*Ling Swee Lin v. Public Finance Bhd & Anor [2007] 3 CLJ 737 HC* ***(dist)***
*Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1969] 1 LNS 116 FC* ***(refd)***
*Mason v. Burningham [1949] 2 KB 545* ***(refd)***
*Niblett v. Confectioners' Materials Co Ltd [1921] 3 KB 387* ***(refd)***
*Pengangkutan Ibrahim Mohd Sdn Bhd v. Starlite Motor & Services Centre (Suit No: S1-22-258-2002) (Unreported)* ***(refd)***
*Public Finance Bhd v. Ehwan Saring [1996] 1 CLJ 628 HC* ***(dist)***
*Rowland v. Divall [1923] 2 KB 500* ***(refd)***
*Shine v. General Guarantee Corp Ltd [1988] 1 All ER 911* ***(refd)***
*Suntharaju Pachayappan v. Jabatan Kastam Diraja Malaysia [2010] 3 CLJ 865 HC* ***(refd)***
*Tan Chye Chew & Anor v. Eastern Mining And Metals Co [1964] 1 LNS 194 FC* ***(refd)***
*Trade Ocean Exporters Sdn Bhd v. Arab-Malaysian Finance Bhd & Other Cases [2009] 10 CLJ 758 HC* ***(refd)***
*Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd [2010] 4 CLJ 203 CA* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, ss. 413, 416
Customs Act 1967, ss. 115(1), 128(1)
Hire Purchase Act 1967, ss. 7(1), 33(1), (2)

*For the plaintiff - Andrew Chiew (CB Loh with him); M/s Lee Hishammuddin Allen & Gledhill*
*For the defendant & 4th party - KC Wan; M/s KC Wan & Co*
*For the 3rd party - Gopi Seshadari (CY Lian with him); M/s Gopi Seshadari*

*Reported by Najib Tamby*

## JUDGMENT

**Hamid Sultan Abu Backer J:**

**[1]** This is my judgment in respect of a hire purchase agreement entered by the plaintiff with the defendant as hirer, pursuant to the Hire Purchase Act 1967. The problem here is that the defendant has undertaken to pay the customs duty to the dealer, but he has not paid, and the car was seized by the customs. The

defendant now attempts to push his liability on the plaintiff, and seeks protection under the Hire Purchase Act 1967 to evade liability, notwithstanding he has taken possession of the vehicle from the customs.

## Parties Claim

**[2]** The plaintiff's claim against the defendant is for breach of the hire purchase agreement, ie, non-payment of the instalments. The relevant part of the statement of claim, *inter alia*, reads as follows:

> 8. Plaintif seterusnya melalui surat peguamcara plaintif bertarikh 12 Ogos 2009 yang juga merujuk kepada surat penamatan perjanjian yang bertarikh 03 Februari 2009 serta surat tuntutan yang bertarikh 14 Julai 2009 telah menuntut dari defendan untuk pembayaran keseluruhan jumlah yang tertunggak dibawah perjanjian tersebut. Walaupun dituntut, defendan masih telah gagal, enggan dan/atau cuai untuk membuat apa-apa bayaran dan menyebabkan plaintif mengalami kerugian dan kerosakan yang mana butiran ringkasnya adalah seperti berikut:
>
> BUTIR-BUTIR
>
> NO. PERJANJIAN : 125-83-03774-9
> BERTARIKH 02-11-2006
>
> | | | |
> |---|---|---|
> | Harga Sewa Beli | RM | 1,800,000.00 |
> | Tolak : Deposit | RM | 1,000,000.00 |
> | | RM | 800,000.00 |
> | Tambah: Caj-caj terma | RM | 101,200.00 |
> | | RM | 901,200.00 |
> | Tolak: Ansuran yang dibayar | RM | 345,460.00 |
> | Rebet | RM | 19,410.49 |
> | | RM | 536,329.51 |
> | Tambah: Faedah lewat bayar | RM | 5,040.02 |
> | Kos guaman | RM | 250.00 |
> | Pelbagai | RM | 26.00 |
> | Kerugian setakat 10-08-2009 | RM | 541,645.53 |
>
> 9. Oleh yang demikian, plaintif menuntut daripada defendan untuk:
>
> (i) jumlah wang sebanyak RM541,645.53 seperti yang dinyatakan di perenggan lapan di atas;

A (ii) faedah pada kadar 8% setahun dikira ke atas jumlah RM536,329.51 bermula dari 11 Ogos 2009 sehingga tarikh penyelesaian penuh;

(iii) kos; dan

B (iv) apa-apa perintah dan relif yang difikirkan adil dan munasabah dalam budibicara mahkamah yang mulia ini.

**[3]** The defendant's defence, in essence, is that the car has been seized by the customs, and in consequence, there is total failure of consideration. The defendant seeks rescission of the hire C purchase agreement, and counter claims for a sum of RM1,345,460 etc.

**[4]** In the third party action, the plaintiff has brought the dealer, whom the plaintiff had purchased from, upon the request D of the defendant, to indemnify for the loss, if any, suffered by the plaintiff.

**[5]** The third party has brought the defendant as the fourth party, and seeking indemnity from him, as the car was purchased E exclusive of customs duty, and there was an undertaking by the defendant to pay the duty.

**[6]** It must be noted that in the instant case: (i) there will be no issue if the customs duty is duly paid; (ii) the defendant had F purchased the car from the third party for the sum about RM800,000 on or about 10 August 2005, excluding customs duty (see encl. 62, pp. 3 & 3A); (iii) after payment of the purchase price, only then the defendant applied for finance from the plaintiff representing that the purchase price was RM1,800,000, and he G had paid RM1 million; (iv) it was the defendant who secured a proforma invoice from the third party for RM1,800,000, which does not correctly represent the sale price (see encl. 52 p. 6); (v) the plaintiff had, based on the representation, remitted the facility sum of about RM800,000 to the third party; (vi) the third H party, at a late stage, revealed that the sum received was paid to the defendant (see encl. 62, p. 10); (vii) because of this evidence was revealed at a late stage, the plaintiff was not able to plead the same; (viii) the defendant was not able to credibly deny the sum paid was not for the purpose of the said transaction; (ix) the I customs seized the vehicle after nearly two years of use by the

defendant; (x) the defendant had managed to obtain release of the vehicle from the customs; and (xi) the vehicle is in the defendant's possession.

**[7]** The parties have relied on the following cases: *Wee Lian Construction Sdn Bhd v. Ingersoll-Jati Malaysia Sdn Bhd* [2010] 4 CLJ 203; *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1969] 1 LNS 116; *Jaafar Shaari & Anor v. Tan Lip Eng & Anor* [1992] 3 CLJ 1600; [1992] 2 CLJ (Rep) 597; *Autokita Sdn Bhd v. Public Finance Bhd* [2006] 1 CLJ 653; *Tan Chye Chew & Anor v. Eastern Mining And Metals Co* [1964] 1 LNS 194; *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102; *Sunthararaju Pachayappan v. Jabatan Kastam Diraja Malaysia* [2010] 3 CLJ 865; *AmBank (M) Bhd v. Pang Tee Chiang & Another Appeal* [2012] 1 CLJ 206; *Trade Ocean Exporters Sdn Bhd v. Arab-Malaysian Finance Bhd & Other Cases* [2009] 10 CLJ 758; *Pengangkutan Ibrahim Mohd Sdn Bhd v. Starlite Motor & Services Centre (Unreported, Kuala Lumpur High Court, Suit No: S1-22-258-2002)*; *Niblett v. Confectioners' Materials Co Ltd* [1921] 3 KB 387; *Mason v. Burningham* [1949] 2 KB 545; *Affin-ACF Finance Berhad v. Phang Ngan Heong* [2010] 7 CLJ 592; *Lian Lee Motor Sdn Bhd v. Azizuddin Khairuddin* [2001] 1 CLJ 768; *Rowland v. Divall* [1923] 2 KB 500; *Shine v. General Guarantee Corp Ltd* [1988] 1 All ER 911; *Public Finance Bhd v. Ehwan Saring* [1996] 1 CLJ 628; *BBMB Kewangan Bhd v. Tan Swee Heng & Anor* [2002] 7 CLJ 377.

## Brief Facts

**[8]** The brief facts of the case have been well articulated by the parties in encls. 59, 56 and 76. Much judicial time will be saved if encls. 59 and 56 are reproduced to set out the plaintiff's case and the defendant's case.

**[9]** The plaintiff's summary of facts in encl. 59 reads as follows:

> 1. Brief Facts
>
> (1.1) By way of sales contracts dated 10 August 2005, 11 August 2005 and 29 March 2006, the defendant entered into an agreement to purchase a Ferrari 430-F1 ("vehicle") from the 3rd party.
>
> (1.2) It is important to note that the defendant purchased the vehicle on the basis that the defendant shall be liable to settle the custom duties and taxes for the vehicle.

(1.3) The purchase price for the vehicle was USD225,013,00 which would have been not more than RM830,000 (based on the police report lodged by one Johan Soh, a former employee of the 3rd party on 26 July 2011).

(1.4) The defendant needed financing to purchase the vehicle.

(1.5) On 20 August 2006, the defendant got the 3rd party to issue a pro forma invoice dated 2 October 2006. The pro forma invoice showed that the vehicle was worth RM1.8 million and a deposit of RM1 million had purportedly been paid by the defendant. The balance sum of RM800,000 was due and owing to the 3rd party.

(1.6) The defendant applied for financing for RM800,000 from the plaintiff.

(1.7) On 2 February 2006, the plaintiff granted a hire purchase facility to the defendant to finance the purchase of the vehicle.

(1.8) On 18 November 2008, the vehicle was seized by customs.

(1.9) On 28 November 2008 and 23 December 2008, the defendant through his solicitors issued a notice claiming a breach of the hire purchase agreement. The defendant had then stopped payment of the installments due under the hire purchase facility.

(1.10) Between these two demands, the plaintiff made an application for release of the vehicle from the customs on 16 December 2008.

(1.11) On 23 December 2008, the defendant through his solicitors, and without notice to the plaintiff, applied and obtained a release of the vehicle from customs.

(1.12) Notwithstanding the defendant have possession of the vehicle, and despite repeated demands by the plaintiff through its solicitors, the defendant did not make any repayment under the hire purchase facility but resumed possession of the vehicle.

(1.13) On 21 August 2009, the plaintiff brought this action against the defendant.

(1.14) On 12 October 2008, the defendant filed his defence and brought a counter claim against the plaintiff.

(1.15) On [date], the plaintiff initiated 3rd party proceedings against the 3rd party, being the seller of the vehicle.

2. Issues

2.1 The issues are:

(a) whether there was a breach of ss. 7(a) and (b) of the Hire Purchase Act 1967 by the plaintiff;

(b) if so, what is the amount which the defendant entitled to claim;

(c) if not, whether the defendant is liable for the amount claimed;

(d) whether there was a breach of s. 14, Sales of Goods Act 1956 by the 3rd party; and

(e) if so, what are the losses payable by the 3rd party.

3. Plaintiff's Case

(3.1) The plaintiff will show that there was no breach of s. 7(a) and 9(b) of HPA because the defendant had assumed responsibility for paying the outstanding customs duties for the vehicle.

(3.2) Assuming that the customs duties were not settled, the defendant cannot now take advantage of his own wrong to justify the alleged breach. In the alternative, the defendant is at the very least estopped from doing so.

(3.3) Further, given that the vehicle was at all material times with the defendant and it was never forfeited by the customs, the plaintiff will submit that there was no breach of s. 7(a) or (b) of the HPA.

(3.4) The defendant's counter claim comprise of RM1 million being the deposit purportedly paid to the 3rd party. There is however no evidence that the defendant paid the said sum. More importantly, the sales contracts between the defendant and the 3rd party show that it is improbable that the defendant could have paid RM1 million.

(3.5) If this court agrees that there is no breach by the plaintiff, the defendant is liable for the amount claimed in the statement of claim. The claim is supported by a certificate of indebtedness which is binding on the defendant.

(3.6) In the 3rd party proceedings, the plaintiff seeks an indemnity from the 3rd party. The plaintiff is liable to do so since the vehicle was sold by the 3rd party to the plaintiff.

(3.7) If this court finds that there is a breach of s. 7 of HPA, the 3rd party will be equally liable under s. 14 of SOGA. My Lord will note that s. 7 of HPA and s. 14 of SOGA are similar, if not *pari materia*.

(3.8) Consequently, the 3rd party must compensated all losses suffered by the plaintiff arising from the sale of the vehicle. The plaintiff will invite this court to so order if the defendant's counter claim is allowed.

**[10]** The defendant's version in encl. 56 reads as follows:

(1) The plaintiff is the owner of the Ferrari F430 F1 Coupe, bearing chassis number: ZFFEZ58C000149461*, engine number: F136E*108953* and duly registered with the Road Transport Department ( RTD) bearing registration number WPC 1 (the said vehicle).

(2) Pursuant to a Hire Purchase Agreement dated 2 November 2006, entered between the defendant as the "Hirer" and the plaintiff as "Owner" and upon the terms stipulated in the said Hire Purchase Agreement and in accordance to the Hire Purchase Act 1967 (the said hire purchase agreement).

(3) Simultaneously upon execution of the said Hire Purchase Agreement, the defendant has paid to the plaintiff's dealer, Next Car Sdn Bhd a total sum of RM1,000,000 as deposits towards the purchase price of the said vehicle. The said total sums was duly acknowledged receipt by the plaintiff and recorded on the tables of payment of the said Hire Purchase Agreement as payment towards the purchase price of the said vehicle.

(4) In addition, the defendant has paid monthly instalments of RM15,020 per month. The first instalment commenced on 2 December 2006 and subsequently on the 2nd of each consecutive months onwards. As at 2 December 2008, the defendant has paid the plaintiff a total sum of RM1,345,460.

(5) On the 18 November 2008, the said vehicle has been seized and confiscated from the defendant's possession by the Preventive Branch of the Royal Malaysian Customs Department, Jalan SS4B/13, Kelana Jaya, 47301, Petaling Jaya, Selangor DE on suspicion the import duties of the said vehicle has not been settled by the plaintiff and or their dealer Next Car Sdn Bhd to the Customs Department. Pursuant to s. 114 Customs Act 1976, a Search List dated 18 November 2008 has been duly issued to the defendant confirming the seizure.

(6) The defendant avers that the said hire purchase account was maintained properly and without arrears of instalment until the said seizure by the Customs Department. On the other hand, The plaintiff and/or their dealer Next Car Sdn Bhd has failed, neglected and refused to pay all duties due to the Customs Department. Consequently the plaintiff has failed to give the defendant quiet possession to the said vehicle and good title and free from any encumbrances.

(7) The defendant *vide* their solicitor's letter, M/s KC Wan & Co dated 28 November 2008 has duly notified the plaintiff of the said seizure and demanded the plaintiff to secure the return the said vehicle to the defendant on or before the 17 December 2008 failing which the plaintiff would be deemed to have breached the provisions of ss. 7(1)(a) and 9(b) of the Hire Purchase Act 1967.

(8) The plaintiff has failed to give the defendant quiet possession to the said vehicle and the plaintiff has also failed to give the defendant good title to the said vehicle free from any encumbrances. The defendant *vide* their solicitor's M/s KC Wan & Co letter dated 23 December 2008, has exercised his option to terminate the said hire purchase agreement and demanded that all monies paid by the defendant pursuant to the said hire purchase agreement be refunded with interests.

(9) The plaintiff who held themselves out as "owner" of the said vehicle has wilfully refused to settle the import duties due and payable by them and or their dealer and refused to execute a customs bond. Consequently, for the sake of preserving the good condition of the said vehicle and to preserve his claims against the plaintiff, the defendant has no alternative but to execute a customs bond dated 20 January 2009 with terms and conditions attached therein.

(10) The director of the Federal Territory's Customs Department *vide* letter dated 27 April 2010 has written to the plaintiff's dealer, Next Car Sdn Bhd informing that investigations revealed an offence under s. 133(1) Customs Act 1976 has been committed and the import duties due and payable RM839,579,01 and a compound of RM5,000, total amounts to RM844,579,01 is due and payable to the director of Customs Department, Federal Territory within 14 days from the 27 January 2010. The plaintiff has also failed, refused and neglected to pay the entire aforesaid sums.

(11) The defendant's case against the plaintiff, is for total failure of consideration and rescission of the hire purchase agreement and the plaintiff shall refund to the defendant all monies paid amounting to RM1,345,460 together with interest at the rate of 8% per annum from the date of seizure 18 November 2008 till the date of full realisation.

## Preliminaries

**[11]** Three witnesses gave evidence for the plaintiff and four gave evidence for the defendant and one witness gave evidence for the third party.

**[12]** Taking into account the factual matrix of the case, the evidence of the defendant was economical as to the truth. Learned counsel for the plaintiff in the submission encl. 77 para. 4.14 says as follows:

> At this juncture, it is important to recall the evasiveness and inconsistencies displayed in the defendant's evidence during trial. In particular, My Lord recalls how the defendant was evasive and was not candid in answering questions on whether he had paid customs. This renders his evidence unreliable.

**[13]** Learned counsel for the third party in encl. 76 para. 37 had this to say about the defendant's evidence, and it reads as follows:

> Following that stated above, we set out below the evidence of the defendant that clearly shows that defendant has not only not been able to prove his claim but it has become apparent that the defendant had blatantly lied and is essentially making a fraudulent claim particularly in regard to the sum of RM1,000,000 that he is claiming.

**[14]** I am in total agreement with the observations expressed by learned counsel for the plaintiff. In fact, the defendant's case is totally inconsistent with his letter of indemnity in encl. 52 at p. 6 which reads as follows:

> Dato Chee Kok Wing
> NasionCom Holdings Bhd
> 5-5 The Baulevard, Mid Valley City
> Lingkaran Syed Putra
> 59200 Kuala Lumpur
>
> 20th September 2006
>
> To:
>
> Next Car Sdn Bhd
> No 6, Jalan l9llB,
> 46300 Petaling Jaya
>
> RE: INDEMNITY LETTER
> FERRARI F430 Ft. CHASSIS ZFFEZ58C000149461
>
> Refer to the above and my intention to obtain a loan to finance the purchase of the car *via* Hong Leong Bank Berhad.
>
> As I bought the car at export price from Next Car Sdn Bhd, in order for the loan to be approved, I will need your esteemed company to provide Hong Leong Bank Bhd a Pro forma invoice stating the on the road price of the car at RM1.8 million.
>
> I hereby acknowledge that I am solely responsible for the duty payment, registration and servicing of the loan for this car and undertakes to indemnify Next Car Sdn Bhd against any losses or litigation, if any, brought about by this transaction.
>
> Regards,
> Yours
> Dato Chee Kok Wing

**[15]** In addition, there was no sum of RM1 million paid by the defendant to the third party as per the pro forma invoice. Despite notice to produce served by the plaintiff, the defendant was not able to produce evidence of payment for the shortfall of about RM173,277.83.

**[16]** I also find the third party's witness, Johan Soh bin Abdullah, to be forthright and honest. He confirmed the money received from the plaintiff was refunded to the defendant in the sum of RM800,000, and there was no other transaction of car between the defendant and the third party.

**[17]** I have heard the evidence, read the documents and submission of the parties in detail. The court is grateful to the comprehensive submission of the parties on the facts, law, evidence and contradiction. It will serve no useful purpose to repeat the same save to deal with the core issues. After having given much consideration to the submission of learned counsel for the defendant, I take the view that the defendant's defence and counter claim must be dismissed, and costs of this action in respect of the plaintiff and the third party must be borne by the defendant. My reasons, *inter alia*, are as follows:

(a) It is now well-established that as a general rule, once a car under the hire purchase agreement has been forfeited or the finance company has no good title, it will be in breach of s. 7(1) of the Hire Purchase Act 1967, which reads as follows:

> In every hire-purchase agreement there shall be:
>
> (a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods;
>
> (b) an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass;
>
> (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass.

(b) I have dealt with this area of jurisprudence to some extent in *Ling Swee Lin v. Public Finance Bhd & Anor* [2007] 3 CLJ 737, where it was, *inter alia*, held:

> (1) The HPA recognizes certain conditions and warranties to be implied in every hire purchase agreement. Thus, under s. 7(1)(a) the owner gives a warranty that the hirer shall have and enjoy quiet possession of the goods, whilst under s. 7(1)(b) there is an implied condition that the owner has the right to sell the goods at the time the property is to pass to the hirer. Likewise, under s. 7(1)(c) there is an implied warranty that the goods are free from any charge or encumbrance. Also, at common law, if this condition is not satisfied, there is a total failure of consideration such as to entitle the hirer to obtain a refund of all hire charges and instalments paid. (para. 8)
>
> (2) In the context of vehicles under the HPA, 'quiet enjoyment' includes possession and uninterrupted use by the hirer of the vehicle as ordinarily expected under the terms of hire

purchase agreement. In this case, the hirer has lost possession of the vehicle (to the police) and the defendant was in no position to put the hirer into possession and in consequence is patently in breach of the statutory warranty. (para. 8)

(2a) In a wider sense it can be said that s. 7(1)(a), (b) and (c) are inextricably interwoven to obtain a permanent status of 'quiet possession'. Since they are so inextricably interwoven, the 'quiet enjoyment' must attain the status of implied condition and nothing less. (para. 8)

(3) Under s. 7 of the HPA, the financier must also be the true owner of the vehicle at the time of execution of the hire purchase agreement. Failing that, the agreement will be *null* and *void* as the financier will have nothing to let or sell under the law. (para. 9).

Similar views have been expressed in cases such as: (i) *Public Finance Berhad v. Ehwan bin Saring (supra)* and (ii) *BBMB Kewangan Bhd v. Tan Swee Heng & Anor (supra)*.

In the instant case, the car has not been forfeited, and the vehicle has been released by the customs, and currently in the possession of the defendant. Learned counsel for the plaintiff says that the above three cases mentioned are not applicable to this case because of three important distinguished features namely:

(i) the hired vehicle is not forfeited yet;

(ii) the alleged breach of s. 7(1) of the Hire Purchase Act 1967 was not caused by the plaintiff;

(iii) there is inequitable conduct on the part of the hirer.

Learned counsel for the plaintiff distinguishes the above three cases as follows:

(i) In *Ehwan Saring (supra)*, customs seized the hired vehicle due to an offence under the customs. The facts, as set out in Justice Mohd. Ghazali's judgment, show the bank through its solicitors "requested" for the vehicle to be returned under s. 115 of the Customs Act 1967. It is not clear if a formal application was made with the customs for its return. However, at p. 344C-G, the judge had found that the hired vehicle was " ... deemed to be forfeited by the customs pursuant to s. 128(1) of the Customs Act."

(ii) In *Tan Swee Hong (supra)*, customs also seized the hired vehicle due to an offence under the customs. Justice Ramly Ali, at p. 388b-d, found that there was a breach of s. 7(1) of Hire Purchase Act 1967 because the vehicle had not been returned to the hirer even when the matter came up for trial before the magistrate. There is nothing to suggest that an application has been made under s. 115(1) of the Customs Act 1967 for the vehicle to be released.

(iii) In *Ling Swee Lin (supra)*, the vehicle was seized by the Royal Malaysian Police. The facts show that the plaintiff financier did not take any steps to secure the release of the vehicle although the plaintiff could have done so under s. 413 of the Criminal Procedure Code (CPC). Unlike ss. 115 and 128, the seized vehicle is not deemed to be forfeited when a vehicle is seized under ss. 413 to 416 of CPC. In *Ling Swee Lin*, the owner took no steps whatsoever to secure the release of the vehicle so that it could be returned to the hirer. In the instant case, the owner took steps to secure the release of the vehicle.

(c) In addition, learned counsel for the plaintiff says that the plaintiff is not blameworthy for the breach, and his submission can be summarised as follows:

(i) In *Ambank (M) Bhd v. Pang Tee Chiang & Another (supra)* the Court of Appeal did not find that there was a breach of s. 7(1) of the Hire Purchase Act 1967 because, on the facts, the deprivation was caused by the Customs Department and not the owner/financier, and the owner/financier was not liable for the violation of the implied warranty;

(ii) In *Trade Ocean Exporters Sdn Bhd (supra)*, Justice Mary Lim had likewise held there is no breach of s. 7(1) of the Hire Purchase Act 1967 given the seizure was caused by customs, and not the owner/financier. In doing so, the court followed the rationale of the old Federal Court in *Ahmad Ismail v. Malaya Motor Co & Anor (supra)*; and

(iii) In *Pengangkutan Ibrahim Mohd Sdn Bhd (supra)*, Justice Kang Hwee Ghee dismissed the claim brought by the hirer against the owner/financier because customs failed to release the vehicle after it was seized even though an application for its release was made.

I take the view that the submission of learned counsel has merits taking into consideration the factual matrix of this case. In the instant case, it is evidently clear that the defendant was responsible to pay the duty, and the car will not be forfeited if he had kept to his bargain. Since there was no forfeiture resulting from the breach of the plaintiff or third party, the defendant's reliance on s. 7 of the Hire Purchase Act 1967 will in fact be abhorrent to notions of justice and fair play. The Hire Purchase Act 1967 is not cultured to give credence to wrongful act or conduct of hirer, but to protect innocent hirer. There is also merit in the submission of the plaintiff that the court has wide powers under s. 33(1) and (2) of the Hire Purchase Act 1967 to re-open the transaction to ensure that there is no injustice. In this respect there is much merit in the submission of learned counsel which reads as follows:

> If the court allowed the defendant's counter claim, it would have the following effect:
>
> (a) the defendant receive a payment of RM1 million deposit which he never paid;
>
> (b) the defendant get full refund of all instalment payments totalling RM345,360 as a result of the defendant's failure to settle the customs duties;
>
> (c) the defendant was at all material times enjoying the use of the vehicle without paying any instalment payments although there is an obligation to do so under cl. 1(a) of the HPA; and
>
> (d) the defendant has gotten back his purchase price for the vehicle through a financing granted by the plaintiff.

**[18]** For reasons stated above, I allow the plaintiff's prayers (i) and (ii), and dismiss the defendant's counter claim. The plaintiff's claim against the third party is dismissed. The third party's claim against the defendant (as fourth party) is dismissed. The defendant to pay the plaintiff costs in the sum of RM30,000, and to the third party costs in the sum of RM20,000. The plaintiff and the third party must pay allocatur fees before the extraction of order for costs, and the deputy registrar to issue certificate for the allocatur.